

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of

**Implementation of Sections 3(n) and 332 of
the Communications Act**

Regulatory Treatment of Mobile Services

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GN Docket No. 93-252

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**COMMENTS OF
AMERITECH**

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TABLE OF CONTENTS

	<u>Page</u>
Summary	i
Comments of Ameritech	1
Cellular And PCS Must Have The Same Flexibility To Provide Wireless Services	2
The Commission Should Eliminate The Structural Separation Requirements On The BOCS' Provision Of Cellular Service	4
A. The Commission Should Eliminate Cellular Structural Separation To Ensure Fair Competition	5
B. Structural Separation Requirements Create Economic Inefficiencies	6
C. Structural Separation Is No Longer Necessary	7
D. Non-Structural Safeguards Provide Adequate Protection With Lower Costs	8
The Commission Should Adopt Uniform Interconnection Requirements For All Common Carriers	10
Conclusion	11

SUMMARY

Congress amended Sections 3(n) and 332 of the Communications Act to establish regulatory and competitive parity between wireless services.¹ A major cause of today's uneven playing field is the stricter regulation of common carrier services that are indistinguishable, from a customer perspective, from private radio services. Congress sought to end this disparity by directing the Commission to ensure that licensees "provid[ing] equivalent mobile services are regulated in the same manner." H. R. Rep. No. 111, 103rd Cong., 1st Sess. at 259 (1993).

Merely classifying a service as either a "commercial mobile service" or a "private mobile service", however, will not completely cure the problem that Congress identified. There are also impediments to fair competition embedded in the Commission's existing rules for specific wireless services. The Commission should remedy these impediments by:

- Giving cellular licensees flexibility to provide both common carrier and private radio services on the same basis as Personal Communications Service (PCS) licensees;
- Eliminating the Part 22 structural separation requirements which are now uniquely imposed upon BOC cellular providers, thereby preventing regulation-imposed costs from skewing competition; and
- Establishing uniform interconnection rights and obligations on all entities operating common carrier networks.

¹Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993) (Budget Act).

These changes to the Commission's rules will address the concerns that caused Congress to amend the Act and will create a fully competitive, market-responsive regulatory scheme for wireless services.

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COMMENTS OF AMERITECH

Ameritech respectfully submits these comments on the Commission's Notice of Proposed Rule Making in *Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services*, GN Docket No. 93-252 (rel. Oct. 8, 1993) (NPRM).

This proceeding was initiated at the direction of Congress to establish a level wireless playing field. At present, common carrier and private radio services that are indistinguishable to the consumer are subject to very different regulation. This caused the House Committee on Energy and Commerce to conclude that "the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services." H. R. Rep. 111, 103rd Cong., 1st Sess. at 260. By establishing like regulation of substitutable services, the Commission will promote competition. This, in turn, will enable licensees to better serve the communications needs of all wireless consumers and further allow them to maximize the efficient use of their assigned spectrum. A crucial step

toward achieving Congress' goal of regulatory parity is the establishment of equal regulation for cellular and PCS licensees.²

**Cellular And PCS Must Have The Same
Flexibility To Provide Wireless Services.**

In the Notice of Proposed Rule Making in this proceeding, the Commission proposed that "no single regulatory classification should be applied to all PCS services". *NPRM* at 17 ¶45. Instead, the Commission proposed "to allow PCS licensees to provide both commercial and private mobile services on a co-primary basis under a single license." *Id.* at 18 ¶47. The Commission is correct -- if it were to bind PCS into a single regulatory classification, the "potential diversity of applications would be unnecessarily restricted." *Id.* at 17 ¶ 45.³

Adoption of this proposal, however, will create a significant competitive disadvantage for cellular licensees. The Commission's existing rules restrict, in several ways, cellular licensees' flexibility to offer non-cellular or auxiliary services: (1) cellular licensees may only offer "auxiliary common carrier services" on their allocated spectrum; (2) cellular licensees may not offer fixed services other than BETRS; and (3) cellular licensees may only offer auxiliary services after notice to the Commission. 47 C.F.R. § 22.930 (1992) (emphasis

²The Commission envisions that PCS will be "highly competitive" with cellular service. See *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 7 FCC Rcd 5676, 5712 ¶ 94 (1992).

³Embedded in this proposal is the Commission's decision regarding the definition of PCS: "[I]t is important that the PCS definition provide for operation of the widest possible range of such communications." *Amendment of the Commission's Rules to Establish New Personal Communications Services*, "Second Report and Order", GEN Docket No. 90-314, at 13 ¶23 (rel. Oct. 22, 1993) (*PCS Order*). Indeed, the only limit that the Commission has imposed on the use of spectrum allocated to PCS licensees is that it may not be used for broadcast services and it may be used for fixed services only on an ancillary basis. *Id.*

supplied).⁴ These limitations impede cellular licensees' ability to respond to market demand, with a corresponding detriment to consumers.

In contrast, the Commission specifically proposed in the *NPRM* not to impose these limitations on PCS licensees. Instead, the Commission proposes "to allow all PCS licensees to choose whether to provide commercial mobile or private mobile service". *NPRM* at 18 ¶46.⁵ In addition, they can offer fixed services and they need not provide any notice to the Commission prior to offering services. Thus, PCS licensees will be able to offer individually-tailored "one-stop-shopping" to meet the diverse wireless needs of their customers, while cellular licensees will continue to be hamstrung by the limitations contained in Rule 22.930.

This disparity is contrary to the public interest and undercuts the basis for Congress' amendment to Section 332 of the Act. In order for cellular licensees to compete effectively with PCS licensees, the Commission should remove the limitations contained in Rule

⁴See also *Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, "Report and Order", 3 FCC Rcd 7033 (1988), "Memorandum Opinion and Order", 5 FCC Rcd 1138 (1990) (*Auxiliary Services*). The Commission has proposed to remove the restriction on cellular licensee provision of fixed services. *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, 7 FCC Rcd 3658, 3672 (1992).

⁵The Commission proposed similar flexibility for existing private mobile licensees. "[W]e prefer to afford licensees on existing private land mobile frequencies the flexibility to provide either commercial or private service as defined by our rules." *Id.* at 15 ¶40.

22.930.⁶ This will maximize cellular licensees' efficient use of spectrum while allowing them to meet the panoply of needs of their customers.⁷

The Commission Should Eliminate The Structural Separation Requirements On The BOCS' Provision Of Cellular Service.

Another crucial aspect of competitive parity is that licensees providing similar services should not incur disparate regulation-imposed costs. As the Commission's rules are presently structured, however, parity will not exist between BOC cellular licensees and PCS licensees due to the Part 22 structural separation requirements. 47 C.F.R. § 22.901 (1992). Structural separation is costly, and the associated costs, as the Commission itself has found, simply outweigh its benefits. In order to promote efficient resource utilization and fair competition between PCS and cellular service providers, the Commission should eliminate its cellular structural separation requirements.

⁶This is not to say that a cellular licensee's primary obligation to provide cellular service should be changed at this time. A cellular licensee simply should be entitled on an auxiliary basis to provide private radio services and fixed services on the same basis it is presently allowed to provide auxiliary common carrier services, minus the notice requirement.

⁷It will also be necessary for the Commission to change certain other provisions of its Part 22 rules. For example, the Commission's rules contain a specific prohibition on cellular licensees providing dispatch services: "Dispatch communications are prohibited on cellular frequencies." 47 C.F.R. § 22.911 (1992); *see also Auxiliary Services*, 3 FCC Rcd at 7042 ¶76. Congress specifically authorized the Commission in the Budget Act, however, to terminate the prohibition on common carrier provision of dispatch services. If the Commission allows PCS licensees to offer dispatch services to their customers, it should eliminate the corresponding cellular prohibition contained in Rule 22.911. As with any other private radio services, cellular licensees will be at a competitive disadvantage if they are prohibited from offering dispatch service to their customers while PCS licensees are able to do so.

A. The Commission Should Eliminate Cellular Structural Separation To Ensure Fair Competition.

The Commission currently imposes structural separation on BOCs that provide cellular services. In addition, the Commission imposes non-structural safeguards. Thus, to be eligible to provide cellular services, BOCs must currently establish and maintain a fully separated corporate entity and must comply with strict rules governing how they do business. 47 C.F.R. § 22.901.⁸

PCS providers will not be subject to any of these structural separation requirements. As the Commission concluded in its PCS rulemaking, "no new separate subsidiary requirements are necessary for LECs (including BOCs) that provide PCS." *PCS Order* at 52 ¶126.⁹ Thus, PCS providers will not incur any of the costs or inefficiencies of full structural separation. If BOCs are forced to continue providing cellular service through a separate subsidiary, they will be at a substantial competitive disadvantage due to the burdens and costs of structural separation.

⁸For example, each BOC cellular subsidiary must: (a) maintain its own books of account, (b) have separate officers, (c) utilize separate operating, marketing, installation, and maintenance personnel, and (d) utilize separate computer and transmission facilities in the provision of cellular services." 47 C.F.R. § 22.901(c)(2). Similarly, each BOC parent may not sell or promote cellular services on behalf of the separate entities. 47 C.F.R. § 22.901(d)(1). Finally, each BOC and separate subsidiary must comply with the following: (a) any research or development for the separate entity must be done on a compensatory basis; (b) any transaction between the separate entity and the BOC which involves the transfer "of money, personnel, resources, other assets or anything of value [must] be reduced to writing," which must be kept available for inspection; and (c) any arrangement "to interconnect[] with landline network exchange and transmission facilities [must] be filed with the Commission." 47 C.F.R. §§ 22.901(c)(2), (3).

⁹Of course, the value to a BOC of being able to provide PCS without structural separation is limited to the extent that the BOC's cellular subsidiary provides service in a given market, because then the BOC would only be authorized to acquire a 10 MHz PCS spectrum block. *Id.* at 46 ¶106.

The correct approach for the Commission is to promote competition, not particular groups of competitors. To do that here, the Commission must lift the structural separation requirement from the BOCs.

**B. Structural Separation Requirements
Create Economic Inefficiencies.**

Structural separation imposes economic burdens on BOCs providing cellular service. It entails construction and maintenance of duplicative facilities and a separate corporate entity staffed with separate employees. As the Commission has already found, structurally separate facilities and organizations prevent carriers from taking full advantage of economies of scale and scope.¹⁰ Indirect costs of structural separation, including loss of network efficiencies, stifle development and delivery of new services.¹¹

Structural separation has resulted in organizational inflexibility which prevents BOCs from efficiently meeting the needs of their wireless customers. This inflexibility will make it particularly difficult for BOC cellular providers to compete with their PCS counterparts. As a result, consumers will be denied the benefits of open, fair competition.

¹⁰*Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571, 7575 ¶ 8 (1991) (*Computer III - Order on Remand*), appeal pending sub nom, *People of the State of California, v. FCC*, No. 92-70083 (9th Cir.); *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Computer III)*, 104 F.C.C.2d 958, 1008 ¶ 91 (1986) (*Computer III - Phase I Order*).

¹¹*See Computer III - Order on Remand*, 6 FCC Rcd at 7575 ¶ 8, 7617 ¶ 100, 7621-22 ¶ 105; *Computer III - Phase I Order*, 104 F.C.C.2d at 1007 ¶ 89.

**C. Structural Separation
Is No Longer Necessary.**

The Commission originally imposed structural separation on the BOCs in order to protect against cross-subsidization and discrimination. The Commission was concerned that the BOCs would subsidize their non-regulated (competitive) businesses by shifting costs to their regulated (non-competitive) businesses. This concern is no longer relevant. First, as discussed below, since its imposition of a "separate subsidiary" requirement for mobile and enhanced services, the Commission has reconsidered the effectiveness of such regulation and found it wanting. The Commission has firmly decreed that non-structural safeguards better serve the public interest. Second, price cap regulation at the federal level has been substituted for rate of return regulation. As the D.C. Circuit recognized when it reviewed the proceedings that gave rise to that change, price cap regulation significantly inhibits the ability and motivation to cross-subsidize. *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Cir. 1993), *petition for cert. filed*, Aug. 26, 1993.

Third, due to technological and competitive trends, the local exchange market is becoming increasingly competitive, causing the BOCs to experience significant revenue erosion amongst their largest volume customers. If the BOCs attempted to subsidize their non-regulated businesses by allocating costs to their local exchange subsidiaries, the local exchange market would rapidly become even more attractive to alternative local exchange carriers -- and the BOCs will become even less effective competitors. In short, the concerns that led to the imposition of structural separation are no longer relevant.

D. Non-Structural Safeguards Provide Adequate Protection With Lower Costs.

In the event the Commission determines that some safeguards are necessary, a mix of nonstructural safeguards -- accounting, cost allocation, nondiscriminatory interconnection, and network information disclosure -- will provide substantially equivalent protection to structural separation at far less cost.¹²

In the *Joint Cost Proceeding* and subsequent allocation manual proceedings, the Commission adopted and implemented a detailed plan for allocating costs between a carrier's regulated and unregulated operations.¹³ The Commission has relied upon nonstructural safeguards against cross-subsidization and discrimination -- including cost accounting safeguards, open network architecture, nondiscrimination reporting requirements, and network disclosure rules. Since implementation of the joint cost rules, the Commission's trend has been to remove the structural separation requirement and rely increasingly on nonstructural safeguards.¹⁴

¹²*Computer III - Order on Remand*, 6 FCC Rcd at 7576 ¶ 11; *Computer III - Phase I Order*, 104 F.C.C.2d at 1010 ¶ 96.

¹³*See Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services*, "Fifth Report and Order", FCC 84-547, 49 Fed. Reg. 46378 (Nov. 26, 1984); *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, "Notice of Proposed Rulemaking", 104 F.C.C.2d 59 (1986); "Report and Order", 2 FCC Rcd 1298 (1987) (collectively *Joint Cost Proceeding*).

¹⁴*See, e.g., Computer III - Phase I Order*, 104 F.C.C.2d at 1010 ¶ 96; *American Information Technologies Corp., BellSouth and NYNEX, Interim Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services*, 98 F.C.C.2d 943 (1984), modified on recon., 59 Rad. Reg.2d 309 (1985); *Communications Protocols Under Section 64.702 of the Commission's Rules and Regulations*, 95 F.C.C.2d 584 (1983); *Bell Atlantic Telephone Companies, Emergency Petition for Limited Waiver of Section 64.702 of the Commission's Rules and Regulations to Permit Provision of Centrex Service and Associated Customer Premises Equipment on a Prime Contractor Basis*, Mimeo No. 0358 (rel. Oct. 18, 1985); *Petitions for*

More recently, the Commission engaged in a cost-benefit analysis of structural separation requirements for the provision of enhanced services by the BOCs. The Commission found that the "public interest is better served by eliminating the structural separation requirement."¹⁵ The Commission reasoned that the "strengthened nonstructural safeguards will permit the BOCs more fully to realize their potential in providing [] services to American consumers."¹⁶ Further, it found that

in light of our determination that nonstructural safeguards will effectively protect against BOC cross-subsidization and discrimination, that a structural separation requirement is an unnecessary government intrusion into business judgments by the BOCs regarding the most effective corporate organization for the provision of [] services. A structural separation requirement for BOC provision of [] services would instead erect unnecessary barriers impeding the responsiveness of industry to marketplace incentives that foster increasing use and advancement of the nation's telecommunications assets.¹⁷

Given the Commission's determination -- based on its experience with divestiture and on the continued development of marketplace checks on the BOCs¹⁸ -- that nonstructural

Waiver of Section 64.702 of the Commission's Rules, (Computer II), 100 F.C.C.2d 1057 (1985); Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide Certain Types of Protocol Conversion With Their Basic Telephone Networks, FCC 84-561 (rel. Nov. 28, 1984); Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co., 102 F.C.C.2d 655 (1985); Petition of American Telephone and Telegraph Co. for Limited and Temporary Waiver of 47 C.F.R. § 64.702 Regarding its Provision of Unregulated Services Externally to the AT&T-C Network, Mimeo No. 1147 (rel. Nov. 27, 1985); see also Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 2 FCC Rcd 143 (1987).

¹⁵*Computer III - Order on Remand*, 6 FCC Rcd at 7617 ¶ 98.

¹⁶*Id.* at 7624 ¶ 108.

¹⁷*Id.*

¹⁸*Id.* at 7576 ¶ 10, 7618 ¶ 101; *Computer III - Phase I Order*, 104 F.C.C.2d at 1011 ¶ 97.

safeguards will perform as well as structural separation, but at far less cost to the public, structural separation requirements are equally unnecessary in this context. The Commission should eliminate the structural separation provisions of Rule 22.901.

**The Commission Should Adopt Uniform
Interconnection Requirements For All Common Carriers.**

The Commission sought comment "on the interconnection rights that should be afforded to commercial mobile service providers." *NPRM* at 25 ¶70. In addition, the Commission queried whether commercial mobile service providers should be obligated to provide interconnection to other mobile service providers. *Id.* at 26 ¶71.¹⁹ This section of the *NPRM* raises fundamental questions about how the numerous networks that will develop in the coming years will interact and communicate.

As discussed above, the Commission's initiatives in this proceeding should provide all wireless licensees with maximum flexibility to provide services to their customers. The key to the efficient co-existence of these numerous competing networks will be interconnection. Simply stated, a PCS customer seeking to communicate with a cellular customer must be able to do so with ease and at a reasonable price. This will require that all networks be treated equally, whether wireline or wireless.²⁰ Therefore, the Commission should confirm that interconnection is an obligation as well as a right for all common carriers.

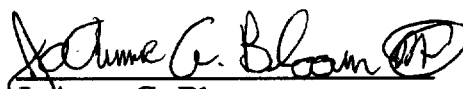
¹⁹See also *Id.* at 6 ¶19 (the Commission considered whether interconnection with a commercial mobile service provider is sufficient to establish the interconnection with the PSTN necessary to be a "commercial mobile service" provider).

²⁰This broad requirement would be consistent with the Commission definition of the public switched telephone network which "encompasses both wirelines and wireless facilities of exchange and interexchange carriers." *Id.* at 8 n.26.

CONCLUSION

Congress' amendment of the Communications Act established the goal of regulatory and competitive parity between wireless licensees. Those amendments can only partially achieve Congress' goal unless the Commission eliminates the embedded disparities contained in its rules, especially as it relates to cellular and PCS licensees. First, the Commission should create parity in the regulatory treatment of services that cellular and PCS licensees may provide. Second, the Commission should create parity in the costs it imposes on licensees. Third, the Commission should create uniform interconnection rights and obligations for all common carriers. These steps will enable the Commission to develop a fair and competitive market place environment where consumers benefit from a variety of offerings from numerous competitors.

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